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July 12, 2012

Kenneth Landau
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VIA EMAIL AND HAND DELIVERY

Alex Mayer
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State Water Resources Control Board
Office of Chief Counsel
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VIA EMAIL ONLY

Re: Submission of Rebuttal Evidence, Legal Analysis, and Policy Statements in Administrative Civil Liability Complaint R5-2012-0515 in the Matter of Del Mar Farms, Jon Maring, Lee Del Don, and Bernard N. & Barbara C. O'Neill Trust

Dear Messrs. Landau and Mayer:

On behalf of Del Mar Farms and Jon Maring ("Del Mar Farms" or "Del Mar"), we submit the following legal analysis, policy statements, and attached evidence to rebut evidence and information submitted by the Central Valley Regional Water Quality Control Board's (Regional Board) Prosecution Team in the aforementioned matter (ACL R5-2012-0515).

I. The Regional Board's Prosecution Team Has Failed to Properly Consider If Enforcement Here Is Necessary to Ensure Compliance With the Conditional Waiver

As a general policy matter, enforcement by the Regional Board under the Porter-Cologne Water Quality Control Act is a discretionary action. Unlike many other environmental laws, alleged violations under Conditional Waivers and Waste Discharge Requirements for irrigated agriculture do not constitute strict liability. The State Water Resources Control Board (State Water Board) adopted the Water Quality Enforcement Policy to provide guidance to Regional Boards to ensure that their limited resources are used in a manner that openly addresses the greatest needs, deters harmful conduct, protects the public, and achieves maximum water quality benefits. (Water Quality Enforcement Policy, p. 1.) Considering the collective facts in this case, the Prosecution Team's proposed ACL R5-2012-0515 is not warranted or justified.

The Prosecution Team proposes to penalize a progressive farming operation over $123,000, ostensibly because it failed to install expensive drip irrigation systems prior to the 2011 crop season. (See, e.g., ACL R5-2012-0515, Attachment G, p. 9.) However, the Prosecution Team fails to consider the totality of circumstances with respect to the Del Mar's farming operations in this area. For example, the map attached as Attachment B to the Rebuttal Statement of Jon Maring in the Matter of ACL R5-2012-0515 (July 12, 2012) (hereafter referred to as "Maring Rebuttal Statement") and attached hereto as Exhibit 1, shows all of the farming parcels in this area, which includes identification of the parcels for which Del Mar Farms has already installed drip irrigation systems, or plans to install drip irrigation systems at the end of this growing season. From this map, it is easy to see that Del Mar Farms is the only grower in this area that has installed drip irrigation, excluding the permanent crops on micro irrigation systems. Furthermore, Attachment A to the Maring Rebuttal Statement provides the Assessor Parcel Numbers and acres in this area for which drip irrigation systems have been installed, or will be installed, from 2010 through 2012. In total, after 2012, the number of acres in drip irrigation for Del Mar Farms in this area will exceed 1,375 acres. This is significant, and represents a substantial investment by Del Mar Farms.

With respect to the specific claims made in ACL R5-2012-0515, the Prosecution Team implies that Del Mar Farms should have installed drip irrigation systems on the O'Neill property prior to the 2011 growing season. However, such claims fail to understand practical constraints associated with the installation of drip irrigation systems. First, Del Mar Farms operates the parcels identified, but all parcels in this area are owned by others, many of which are absentee landowners. (See Maring Rebuttal Statement.) Before installing drip irrigation systems, Del Mar Farms as the lessee, must obtain permission from the landowner. Further, when the drip irrigation system is funded in part through Proposition 84 grants, the landowner must guarantee that the system will be maintained and utilized for the useful life of the system, or 20 years. (See *id.*) Landowners, especially those not directly involved in agriculture, are often hesitant to make such long-term commitments on their property. (*Ibid.*)

Second, and as indicated in our case in chief, Del Mar Farms leased the O'Neill property in late October 2010, and the first year of crop production on this property was the 2011 crop year. Access to the property did not actually occur until early 2011 because the previous tenant was still harvesting its crop. Based on Del Mar Farms' extensive experience, installation of drip irrigation systems is more successful in the fall, after harvest, versus trying to install the system in the spring prior to planting; this is because installation of the drip irrigation hose must be done when the ground is worked properly and dry. (See Maring Rebuttal Statement.) Such ground conditions are found in the fall after harvest, and are less likely to occur in the spring. Final installation can then be completed in the spring when ground conditions are less dry. Because of this practical reality, it was not possible for Del Mar Farms to effectively install drip irrigation systems prior to the 2011 crop year on the O'Neill property.

Considering the totality of circumstances, ACL R5-2012-0515 fails to advance the primary policy principles associated with enforcement actions of this nature. The penalty is being imposed on a farming operation that has installed (or will install by end of 2012) drip irrigation systems on over 1,000 acres in this area alone. The decision to install drip irrigation systems by Del Mar Farms was made in advance of and independent from the proposed penalty in ACL R5-2012-0515. Thus, the deterrent aspect associated with ACLs in general is completely absent in this case. Rather, it sends a signal to other growers that progressive installation of drip irrigation systems will not be considered by the Regional Board as a positive factor in assessing penalties but may in fact be used against a grower in such an action. We fail to see how the Prosecution Team's proposed action here advances the Regional Board's general policy interests with respect to compliance with the Conditional Waiver. For these reasons, and others discussed below, the Regional Board should dismiss ACL R5-2012-0515 in its entirety.

II. The Regional Board's Prosecution Team Has Provided Insufficient Evidence to Sustain the Allegations Contained in ACL R5-2012-0515

ACL R5-2012-0515 alleges that discharges from Del Mar Farms caused or contributed to a violation of turbidity and sediment water quality objectives in the San Joaquin River on May 19, 2011, and that discharges caused or contributed to a violation of sediment water quality objectives on July 6, 2011 and July 19, 2011. The Prosecution Team's evidence is identified as the information contained in ACL R5-2012-0515 as issued, video footage, and records of communications. (See Prosecution Team's Evidence List, submitted on July 3, 2012.) The evidence identified in these documents is collectively insufficient to sustain the allegations contained in ACL R5-2012-0515. With respect to all three alleged events, the Prosecution Team appears to rely on varying and inconsistent evidence, and in some instances appears to rely on evidence from one event to sustain allegations of another event. However, for all three events the evidence is insufficient.

- **July 19, 2011 Event** – With respect to this event, the Prosecution Team has provided *no* monitoring data or photographic evidence of the San Joaquin River. Because of the lack of evidence, it is impossible to know if there were actually any discharges of irrigation return flows into the San Joaquin River on this date from the Amaral Line, or the additional ditch that is southeast of the Amaral Line. (An additional ditch is identified on the map, attached hereto as Exhibit 2, and will be discussed further below.) Further, the lack of San Joaquin River evidence, *at all*, means that the Prosecution Team has no evidence to claim that discharges from properties farmed by Del Mar caused or contributed to a violation of turbidity or sediment water quality objectives in the San Joaquin River on this date. For this reason alone, the Regional Board must dismiss the alleged violation, and any penalty associated therewith.

Furthermore, additional properties down-gradient of Del Mar Farms were being irrigated from the Amaral Line, and other likely discharges were going into the Amaral Line on this date. (July 3, 2012 Memorandum to Theresa A. Dunham from Michael J. Day, P.E., Provost & Pritchard, Subject Technical Memorandum to Regional Water Board's Administrative Civil Liability Complaint Issued to Del Mar Farms (hereafter referred to as "Day Technical Memo"), attached as Exhibit B to Del Mar Farms' July 3, 2012 Submission of Evidence and Policy Statements, pp. 2, 4-5, and map for July 19, 2011.) This means that drainage water from the Del Mar properties is often diluted with irrigation water, and is also diverted and applied to fields downstream of Del Mar Farms. (*Ibid.*) Based on the irrigation records of the Central California Irrigation District (CCID), it is estimated that total suspended solids (TSS) in Del Mar Farms' drainage water, measured by the Prosecution Team as being 572 mg/L, would have been diluted to 218 mg/L TSS by the fresh irrigation water delivered to field 514. (*Id.*, p. 5.) Moreover, when water is diverted from the Amaral Line for irrigation by others on the south side of the Amaral Line (e.g., see Prosecution Team Photo 4 of 5 for July 19, 2011), it then drains to a ditch that is southeast of the Amaral Line, which has a separate outfall pipe to the San Joaquin River. (See Exhibit 2 hereto.) This collective information with respect to the irrigation and drainage system is significant for several reasons: (1) there is no direct correlation between the amount of irrigation water leaving the Del Mar farmed properties in question on this date, and what would ultimately be discharged to the San Joaquin River; (2) any sediment discharged from the Del Mar farmed properties on this date would have been diluted, thus the TSS measurements at the edge-of-field are not indicative as to what might have been discharged to the San Joaquin River; (3) once diverted for irrigation by others, drainage would go into a drainage ditch that is not the Amaral Line; and, (4) the proposed penalty is based in part on a per gallon penalty, but there is no correlation between the amount of drainage leaving the properties farmed by Del Mar Farms and what might have been discharged to the San Joaquin River. Rather, the Prosecution Team proposes that the Regional Board assess a penalty of at least $36,800 for the July 19, 2011 event based solely on edge-of-field data, and no evidence that there were any water quality objective violations in the San Joaquin River. In other words, there is insufficient evidence for the Regional Board to find that sediment discharges from the properties farmed by Del Mar Farms on July 19, 2011, caused or contributed to a violation of sediment water quality objectives.

For these reasons, the Regional Board must dismiss the alleged violation for July 19, 2011.

- **July 6, 2011** – The irrigation circumstances described above for the July 19, 2011 event similarly occurred on July 6, 2011 as well. Using CCID's irrigation flow records for July 6, 2011, drainage water from the properties farmed by Del Mar

Farms would have been diluted to between 219 mg/L and 397 mg/L (Day Technical Memo, p. 5), as compared to the field drainage measurements of 1220 mg/L and 486 mg/L taken by the Prosecution Team. Both of the calculated diluted measurements are below the Prosecution Team's data for the San Joaquin River outfall from the Amaral Line. (Please note that we do not know what time the San Joaquin River measurements were taken, as they are not provided in any of the evidence proffered by the Prosecution Team.) Further, and as is described above with respect to the July 19, 2011 event, when properties south of the Amaral Line irrigate with water from the Amaral Line, any subsequent drainage would then travel through a different drainage ditch to the San Joaquin River, which discharges upstream of the Amaral Line. (See Exhibit 2 attached hereto.) The CCID irrigation records show that such irrigation did occur on July 6, 2011. (Day Technical Memo, pp. 4-5, and map attached thereto for July 6, 2011.) The Prosecution Team provides no data or evidence for this upstream discharge location to indicate that water quality objectives were violated in the San Joaquin River at this location.

Furthermore, flow records of the San Joaquin River (measured by the U.S. Geological Survey at Crows Landing) on the three dates in question indicate that flows ranged from 2,000 to 6,000 cubic feet per second (cfs). (See Day Technical Memo, p. 6, and see also San Joaquin River Flow Records attached thereto.) In comparison, and assuming that the May 19, 2011 outfall flow calculation is applicable to the July 6, 2011 event as it is the only outfall flow calculation available, flow from the Amaral Line was calculated to be 5.3 cfs. (Day Technical Memo, p. 4.) This means that the San Joaquin River flows were 400 to 1,200 times higher than the outfall flow estimated by the Prosecution Team. Based on the difference in flow, maximum actual increases in river turbidity would have been on the order of 1% after complete mixing occurred. (*Id.*, p. 6.) Moreover, the downstream river measurements taken by the Prosecution Team are not necessarily representative of actual San Joaquin River turbidity and TSS measurements because such measurements were taken at a location where blending had not yet occurred. (*Id.*, pp. 5-6.)

As with the July 19, 2011 event, the penalty for this alleged event is based in part on a per gallon assessment. However, due to the many factors described above, there is no direct correlation between the flow measurements taken at the edge-of-field as compared to what is ultimately discharged to the San Joaquin River. Specifically, for the July 6, 2011 event, (1) some drainage from properties farmed by Del Mar Farms was used for irrigation by others, and would have then entered a different drainage pathway versus the Amaral Line; (2) there is no evidence provided that discharges at the upstream drainage location caused or contributed to a violation of a water quality objective; and, (3) there is no actual calculation of drainage volume being discharged from the Amaral Line to the San Joaquin River

on July 6, 2011. Rather, the Prosecution Team proposes that the Regional Board should assess a calculated penalty of $69,691 for the July 6, 2011 event based solely on edge-of-field measurements that have no correlation to the alleged violation in the San Joaquin River.

For these reasons, the Regional Board must dismiss the alleged violation and penalty for the July 6, 2011 event.

- **May 19, 2011 Event** – With respect to the May 19, 2011 event, and like the others, the Prosecution Team has failed to properly account for mixing in the San Joaquin River. As explained above, San Joaquin River flows on May 19, 2011, were 400 to 1,200 times more than the calculated flow coming from the Amaral Line. Due to this difference in flow, maximum actual increases in turbidity from discharges from the Amaral Line in completely-mixed waters of the San Joaquin River would only represent on the order of a 1% increase in turbidity, which is well below the 20% increase that is part of the turbidity water quality objective. For these reasons, the May 19, 2011, alleged violation must be dismissed.

III. The Prosecution Team Has Failed to Provide Any Evidence to Sustain the Allegations That Discharges From Properties Farmed by Del Mar Farms Created Nuisance Conditions in the San Joaquin River

In addition to the allegations with respect to water quality objectives, the Prosecution Team claims that discharges on the three days in question created nuisance conditions in the San Joaquin River. (ACL R5-2012-0515, pp. 5-6.) However, the Prosecution Team has failed to provide any evidence that conditions of nuisance, as defined in the Water Code, occurred as a result of discharges from the Amaral Line – let alone discharges from the properties farmed by Del Mar. For there to be a "nuisance," the Water Code requires that the discharge (1) be injurious to health, or indecent or offensive to the senses, or obstruct the free use of property, so as to interfere with the comfortable enjoyment of life or property, (2) affect at the same time an entire community or neighborhood, or any considerable number of persons, and (3) occurs during, or as a result of the treatment or disposal of wastes. (Wat. Code, § 13050(m).) The Prosecution Team fails to cite to, or explain, how discharges through the Amaral Line from properties farmed by Del Mar created such nuisance conditions in the San Joaquin River.

IV. Identification of Rebuttal Witnesses

Del Mar Farms reserves the right to call the following witnesses for rebuttal, if necessary:

- Jon Maring
- Mike Day

V. Conclusion

Assessment of a penalty in this case will deter many growers from looking to implement progressive best management practices such as installing drip irrigation systems. Further, adoption of ACL R5-2012-0515 will give signal to Regional Board staff that it is "okay" to bring enforcement actions based on limited or no evidence that the discharge has actually caused or contributed to a violation of a water quality objective. Accordingly, the Regional Board must dismiss ACL R5-2012-0515.

Sincerely,

Theresa A. Dunham

Attachments: Exhibits 1 and 2

cc: **Prosecution Team** *(via email only:* ***bstevens@waterboards.ca.gov****)*:
Pamela Creedon, Executive Officer
Frederick Moss, Assist. Executive Officer
Joe Karkoski, Supervisory Water Resource Control Engineer
Brett Stevens, Sr. Environmental Scientist
Terry Bechtel, Environmental Scientist
Andrew Tauriainen, Sr. Staff Counsel (*via email only:* ***atauriainen@waterboards.ca.gov***)

Bernard N. & Barbara C. O'Neill Trust *(via mail)*
Jon Maring, Del Mar Farms *(via email only)*

TAD:cr

Rebuttal Statement of Jon Maring in the Matter of ACL R5-2012-0515

I, Jon Maring, hereby declare as follows:

Del Mar Farms is a progressive farming operation that utilizes the most advanced commercially proven technology available to improve yields and the environment. Del Mar Farms has been very aggressive installing drip irrigation systems in the fields it farms because of its benefits to production and for protection of the environment. The systems installed by Del Mar Farms have reduced, and in some cases eliminated, run-off from fields historically irrigated by flood or furrow irrigation techniques. Drip irrigation systems in our farming operations have improved water quality, and have reduced the amount of tractor work needed to prepare and cultivate the ground. Del Mar Farms estimates that it reduces the diesel it uses per acre by 30%, by eliminating passes with tractors through a tillage program designed by Del Mar Farms to maximize every step of the ground working process.

In my experience, the benefits of drip irrigation as opposed to flood or furrow irrigation are obvious, but installation of such systems is not without obstacles. Drip irrigation systems are very expensive, and depending on the complexity of the system, start at about $1,500/acre and go up from there. Funding is sometimes available for areas considered to be environmentally sensitive, but include certain requirements. For example, the recent program offered through Proposition 84 grant funding requires the landowner to sign a document guaranteeing that the system would be maintained and utilized for the useful life of the project as specified in the Natural Resources Conservation Service program manual, or 20 years. Del Mar Farms in this area, farms leased properties and is not the landowner of these properties. Many landowners who rent their ground to a grower such as Del Mar Farms are hesitant to enter into such a contract that binds the property for 15 years. In particular, based on my years of experience, landowners are even more hesitant if they are not involved in agriculture themselves or are not certain of the land's future use. Also, drip irrigation is not conducive to some crops such as alfalfa, wheat, oats, corn, or beans, which are all very prevalent crops in the Orestimba Creek area.

Drip irrigation systems are not small projects. They are very complex systems that have to be integrated with the irrigation district's supply lines and drains. Planning and approval take time and careful consideration. Del Mar Farms has extensive experience in the process of planning and installing drip irrigation systems.

The process starts by promoting the benefits to the landlord. To most landlords who are unaware of the environmental factors facing growers today, this benefit usually translates to higher rents paid per acre in exchange for a longer lease term. If the landowner agrees that the benefits out-weigh the negatives, then they are likely to enter into an agreement with Del Mar Farms that allows Del Mar Farms to install drip irrigation systems on the land in question.

Once agreement with the landowner has been reached, the design phase begins. This phase includes working with the irrigation company to design the system in a way that it can be utilized in the irrigation district without changing existing irrigation infrastructure. Once the plan is approved by the irrigation district, purchase orders can then be placed for the equipment. Actual installation of the system is limited by weather and ground conditions, and is a critical

EXHIBIT 1

component of the process. The actual window of opportunity to complete an installation project is short.

In the Orestimba Creek area, Del Mar Farms primarily grows processing tomatoes, and finishes harvest in the first half of October. As fall crops are harvested, the ground must be tilled to incorporate crop residues and break compaction layers. Once the ground work is complete after harvest, the drip irrigation hose can then be installed after putting in raised beds for next year's crop. The installation of the hose is the most important part of the process and must be done when the ground is worked properly and dry. The installation of the drip hose before the ground becomes saturated by rain is critical.

If the above steps are completed before the ground becomes too saturated, the rest of the installation work will occur throughout the winter, working around weather and field access. In spring, final touches are completed and utility companies connect power supplies to make the system fully operational.

Based on my experience, the conversion from conventional flood irrigation to these modern systems takes an incredible amount of time, money, and coordination. It is my opinion that Del Mar Farms has acted progressively in this area by leading the way in installing such systems, and by prioritizing installation in the most environmentally sensitive areas first.

The information provided in Attachments A and B to this Rebuttal Statement is true and correct to the best of my knowledge.

Executed this 12th day of July 2012, at Aptos, California.

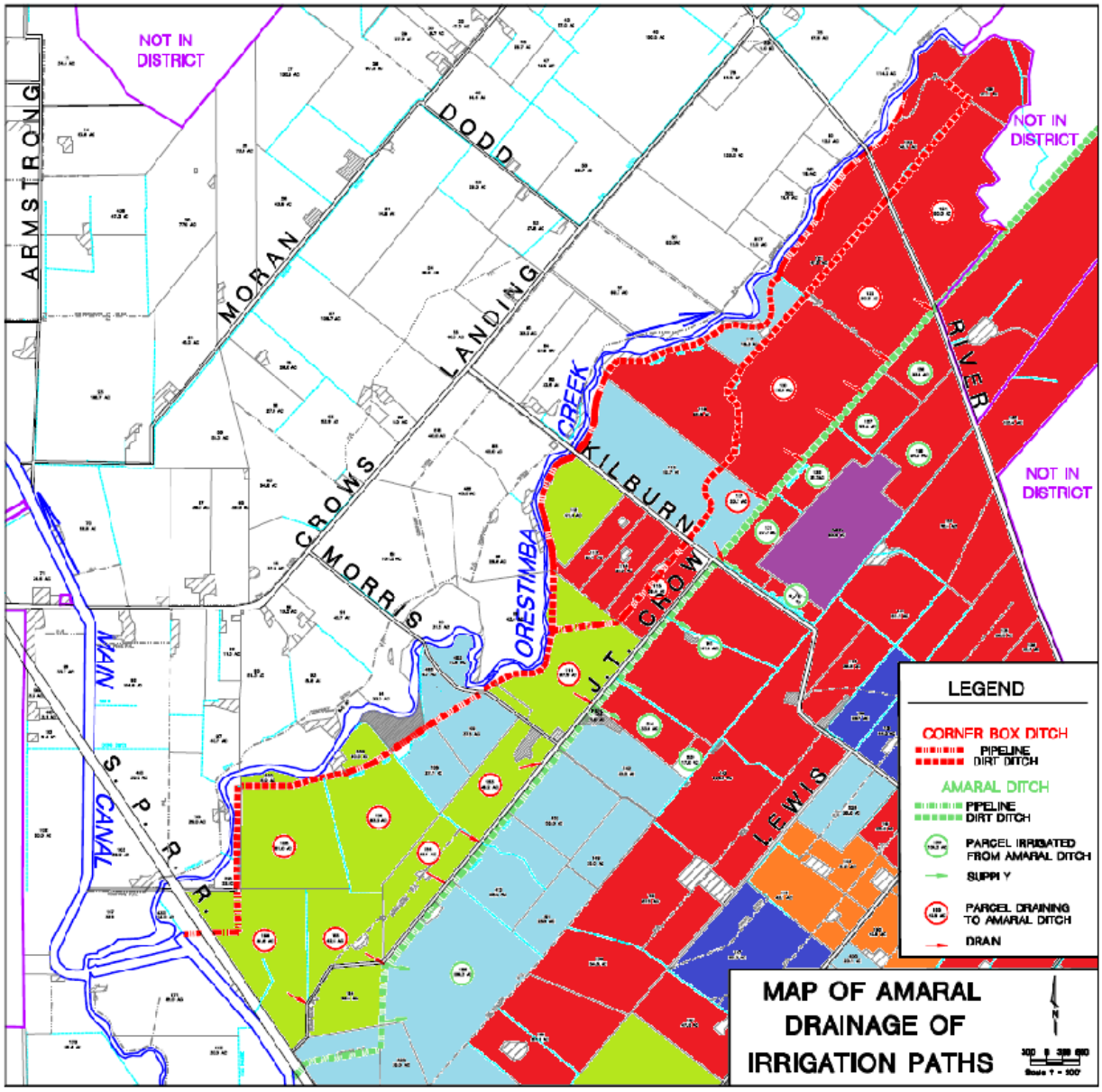
Jon Maring

EXHIBIT 1

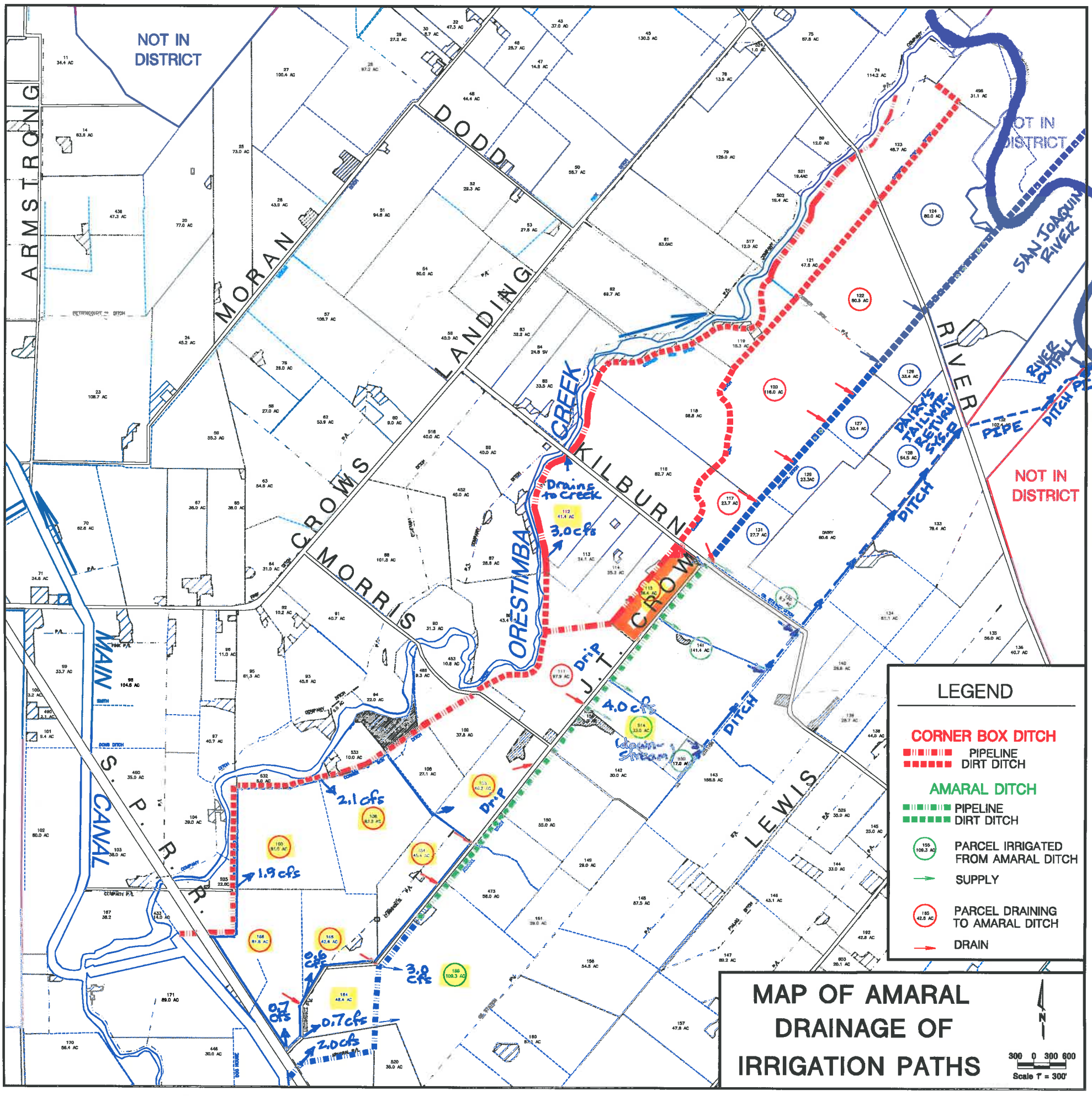
Attachment A to the Rebuttal Statement of Jon Maring

Assessor Parcel Number	Acres
049-013-006	50
049-012-005,008	95
Drip irrigation systems installed in 2010	**145**
027-018-023,029	91.49
049-013-001	93.85
027-018-055	31.12
049-014-001	17.48
049-013-002	93.83
049-013-007,008	50
027-018-024,025	45.86
049-020-005	104.14
049-022-001	187.53
049-012-001	48.057
049-019-001	103
Drip irrigation systems installed in 2011	**866.3**
049-019-004,008	45
049-019-010,015	36.02
049-023-015	43.57
049-023-005,006,007,008	33.5
049-024-001,003	100
049-020-002	106.27
Planned drip installations for fall of 2012	**364.36**

Attachment B to the Rebuttal Statement of Jon Maring



- Del Mar Farms drip irrigated row crops
- Del Mar Farms drip irrigation installation projects for 2012
- Del Mar Farms conventionally flood/furrow irrigated crops
- Permanent crops using micro irrigation systems
- All other growers using conventional flood/furrow irrigation techniques
- Dairy



July 6, 2011

Yellow = being irrigated

Orange = likely discharge by others besides Del Mar to Amaral Line

EXHIBIT 2